No. 77-1827

In the Supreme Court of the United States

OCTOBER TERM, 1978

DANIEL NEWTON FLICKINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JEROME M. FEIT,
FRANK J. MARINE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 573 F. 2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1978, and a petition for rehearing was denied on May 25, 1978 (Pet. App. 1b). The petition for a writ of certiorari was filed on June 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exigent circumstances justified the warrantless entry into petitioner's home on probable cause to arrest him for a felony.

2. Whether the court of appeals erred in applying the "clearly erroneous" standard in reviewing the correctness of the district court's finding of exigent circumstances.

STATEMENT

Following a jury-waived trial in the United States District Court for the District of Nevada, petitioner and his co-defendants, John Munier, Robert McLaughlin and Stanley Hayduk, were convicted of conspiracy to import and to possess marijuana, in violation of 21 U.S.C. 846 and 963, importation of marijuana, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, and possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner was sentenced to a concurrent five-year prison term on each count, to be followed by a two-year special parole term. The court of appeals affirmed (Pet. App. 1a-24a).

The evidence adduced at the suppression hearing and at trial showed that on June 23, 1975, an informant told an agent of the Drug Enforcement Administration that during the past month she had seen an aircraft landing at night without landing lights on a dry lake bed in the area of Beatty, Nevada, and that the aircraft had been met by a four-wheel-drive Chevrolet Suburban (S. Tr. 24).[1] After determining that petitioner owned the Suburban and that he was a licensed pilot, the agents began a surveillance of petitioner and his residence in Las Vegas, Nevada (S. Tr. 26-38).

On July 11, 1975, petitioner and co-defendants McLaughlin and Munier equipped petitioner's Suburban and another Suburban with wide "desert type" tires and installed antennas and radio equipment in the other

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[1] "S. Tr." refers to the transcript of the suppression hearing.

Suburban and in a pickup truck (S. Tr. 35-41). On July 12, McLaughlin and Hayduk installed a large piece of plywood in the bed of the pickup (S. Tr. 42-43). Later that day, the two men painted an insignia on the doors of the truck (S. Tr. 45).

On July 16, 1975, petitioner and Munier drove in petitioner's Suburban from petitioner's home to McCarran Airport in Las Vegas, where they transferred boxes from the vehicle into petitioner's twin engine Piper Navajo aircraft and from the plane to the vehicle (S. Tr. 50-52). Munier then drove away in the Suburban and petitioner took off in the airplane (S. Tr. 52-54). Later that same day, petitioner was observed at the Tucson, Arizona, airport, where he and a man of Mexican appearance bought and reviewed aeronautical maps of Mexico (S. Tr. 72-73). Still later that day, McLaughlin and Hayduk, in the pickup, and Munier, in petitioner's Suburban, drove to a dry lake bed (known as Hidden Hills Dry Lake) in eastern California near the Nevada border (S. Tr. 56-59, 62-63).

There was no activity at the dry lake bed until noon the next day, when Munier drove petitioner's Suburban to a phone booth. After Munier left the booth, D.E.A. agents intercepted a radio transmission over the citizen's band radio in petitioner's Suburban, which said in substance that he "called Susan last night and it's on for tonight" (S. Tr. 69-70). (Petitioner's wife is named Susan.) Munier then returned to the lake bed. Between 11:00 p.m. on July 17 and 1:00 a.m. on July 18, the agents intercepted a series of radio transmissions from petitioner's Suburban, including the statement that "Dan told us to cover up his tracks" (S. Tr. 77-78). At approximately 11:00 p.m. on July 17, one of the agents heard an aircraft land at the lake bed, although the plane could not be seen because it was not using its lights (S. Tr. 74-75). Some two hours

later, petitioner's Suburban and the pickup, also with their lights out, drove away from the lake bed in different directions, the pickup toward Tecopa, California, and the Suburban toward Las Vegas (S. Tr. 76-77). At about 1:15 a.m. petitioner and his Mexican companion landed in petitioner's aircraft at McCarran Airport (S. Tr. 78).

At the D.E.A. agents' request, state police officers stopped the pickup truck at about 4:00 a.m., found 1200 pounds of marijuana in the truck, and arrested its occupants, McLaughlin and Hayduk (S. Tr. 79-80). Meanwhile, at approximately 2:45 a.m., D.E.A. agents observed petitioner's Suburban parked in front of his home (Tr. 672).[2] By 5:30 a.m., the agents at petitioner's home had learned of the marijuana seizure and sought the assistance of additional agents. About an hour later, after two more D.E.A. agents had arrived, the agents knocked at the front door of petitioner's residence, identified themselves, and announced their purpose (Tr. 673-675). Susan Flickinger opened the door, and the agents entered and arrested petitioner, his wife and Munier (Tr. 675-676; S. Tr. 92-93). After petitioner had been advised of his *Miranda* rights but before the agents could ask him any questions, petitioner remarked (Tr. 677): "Look, you've got me. I'm guilty, okay? But don't bust Susan. She doesn't known anything about this. She doesn't know anything about my business. She doesn't know why I've been flying in and out of Mexico." Petitioner also told the agents his source of supply and explained how he had landed his aircraft on the dry lake bed without lights (Tr. 678, 853-856).

Petitioner, his wife and Munier were taken to the federal building, while other agents remained at the residence to await the arrival of a search warrant, which

[2]"Tr." refers to the trial transcript.

was obtained that afternoon (Tr. 679). A search of the house pursuant to the warrant produced an aeronautical map, with the Hidden Hills Dry Lake area encircled in pencil (Tr. 726, 681-682). A subsequent search of petitioner's airplane uncovered marijuana debris (Tr. 876), and a search of petitioner's person after his arrest uncovered a Mexican travel permit.

ARGUMENT

1. Petitioner, presumably seeking suppression of his post-arrest admissions, argues (Pet. 6-7) that the district court erred in finding that the agents' entry into his residence to effect a warrantless, probable cause arrest was supported by exigent circumstances.[3] This claim is insubstantial.

It is an unsettled question "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." *Gerstein* v. *Pugh*, 420 U.S. 103, 113 n. 13. See also *United States* v. *Watson*, 423 U.S. 411, 418 n. 6; *United States* v. *Reed*, 572 F. 2d 412 (C.A. 2). There is no dispute, however, that the absence of a warrant may be justified by exigent circumstances. See *Roaden* v. *Kentucky*, 413 U.S. 496, 505; *Johnson* v. *United States*, 333 U.S. 10, 14-15; *United States* v. *Gardner*, 553 F. 2d 946, 947-948 (C.A. 5), certiorari

[3]The court of appeals correctly concluded that petitioner's arrest was lawful. But even if the arrest had been invalid, that would not necessarily require suppression of petitioner's post-arrest statements, made after he had received *Miranda* warnings. See *Brown* v. *Illinois*, 422 U.S. 590, 603-604; *United States* v. *Ceccolini*, No. 76-1151, decided March 31, 1978. No other evidence was attributable to the arrest entry, since the agents waited until a warrant had been procured before searching petitioner's house. See *United States* v. *Delguyd*, 542 F. 2d 346, 350-352 (C.A. 6). Compare *Mincey* v. *Arizona*, No. 77-5353, decided June 21, 1978, slip op. 7.

denied, No. 77-416, January 9, 1978. See also *Mincey* v. *Arizona*, No. 77-5353, decided June 21, 1978, slip op. 6. Moreover, as the court below properly pointed out, "exigency does not evolve from one single fact [but turns on] the totality of the circumstances * * *" (Pet. App. 8a-9a). So viewed, the facts of this case provided a sufficient basis for a finding of exigency.

To begin with, as petitioner concedes (Pet. App. 8a), at the time of the entry the agents clearly had probable cause to believe that petitioner had imported a substantial amount of marijuana into the United States only a few hours earlier and was then present in his home, probably in possession of large quantities of the easily disposable drug: based on their earlier surveillance, the substance of the overheard radio conversations, and the timing of the arrival and departures of the vehicles and airplane, "the D.E.A. agents could reasonably believe that the two vehicles leaving the lake bed contained contraband" (Pet. App. 10a), and petitioner's Suburban, one of the two vehicles that had met the plane carrying the marijuana, was parked in front of petitioner's home. Additionally, there was a significant danger that petitioner's confederates, who had just been arrested in possession of the illegally imported marijuana, or other co-conspirators (whose identities were unknown), would telephone or otherwise attempt to contact petitioner to warn him of the government's surveillance (Tr. 702) or that "a concerned prospective recipient [of the marijuana] might alert [petitioner] that the delivery was overdue and thus had possibly been intercepted" (Pet. App. 13a). Petitioner's training as a pilot and his access to an airplane heightened the risk of escape (Tr. 684).

Trafficking in controlled substances particularly requires a prompt law enforcement response. As Judge Friendly has observed in sustaining a warrantless drug

arrest in the defendant's home, "agents are entitled to use their knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic * * *." *United States* v. *Manning*, 448 F. 2d 992, 998-999 (C.A. 2) (*en banc*), certiorari denied, 404 U.S. 995. Accord, *United States* v. *Davis*, 461 F. 2d 1026, 1031-1032 (C.A. 3) ("Because of the speed with which narcotics can be dispersed or destroyed, agents must be able to move as quickly as possible. * * * [W]henever the Government attempts to control narcotics and narcotics peddlers, it is dealing with a type of exigent circumstance, the disappearance of evidence or contraband, long recognized as creating an exception to the need for an arrest or search warrant.") Moreover, while there was no evidence in this case that petitioner was actually armed, it was reasonable for the agents to believe that he might have had a gun in his house, given the common experience that large scale drug dealers often employ weapons. Indeed, the agents testified that they were concerned for their safety and feared that the occupants of petitioner's home were armed (Tr. 700-701, 706). The presence of multiple suspects in the house increased the dangers facing the agents.

In short, there was a significant possibility that petitioner would escape or destroy evidence unless the D.E.A. agents acted expeditiously. See, *e.g.*, *Ker* v. *California*, 374 U.S. 23, 40; *United States* v. *McLaughlin*, 525 F. 2d 517, 521 (C.A. 9), certiorari denied, 427 U.S. 904; *United States* v. *Bustamante-Gamez*, 488 F. 2d 4, 8 (C.A. 9), certiorari denied, 416 U.S. 970; *United States* v. *Rubin*, 474 F. 2d 262, 268-270 (C.A. 3), certiorari denied

sub nom. Agran v. *United States*, 414 U.S. 833. The agents' decision to arrest petitioner therefore was a reasonable response to a fast developing chain of events in the early hours of the morning.[4]

2. Petitioner argues (Pet. 7-8) that the court of appeals erred in applying a "clearly erroneous" standard to review the district court's finding of exigent circumstances. We note at the outset that the court below did not state that it would have disagreed with the trial judge if it had decided the exigent circumstances question *de novo*. Moreover, for the reasons outlined above, the district court's determination was plainly correct. Hence, this issue appears to be only of academic importance in the context of this case.

In any event, while the matter is not free from doubt, the weight of authority supports the court of appeals' decision. Although the "exigent circumstances" determination to some extent involves a mixed question of fact and law, it involves the sort of case-specific issue, like the voluntariness *vel non* of a defendant's confession or consent to search, in which deference should be given to the "fact-finding tribunal's experience with the

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[4]There is a strong similarity between this case and the cases applying the doctrine of "hot pursuit." While in a literal sense there was no "chase" here, there was no chase in *Warden* v. *Hayden*, 387 U.S. 294, where the suspect was already inside his home when the officers learned of his whereabouts. Nor was there a "chase" in other recent cases applying the "hot pursuit" doctrine. See, *e.g.*, *United States* v. *Scott*, 520 F. 2d 697, 699-700 (C.A. 9), certiorari denied, 423 U.S. 1056; *United States* v. *Holland*, 511 F. 2d 38, 43-44 (C.A. 6), certiorari denied, 421 U.S. 1001; *United States* v. *Holiday*, 457 F. 2d 912, 914 (C.A. 3), certiorari denied, 409 U.S. 913; *United States* v. *Rose*, 440 F. 2d 832, 834 (C.A. 6), certiorari denied, 404 U.S. 838. Cf. *United States* v. *Easter*, 552 F. 2d 230, 233 (C.A. 8); certiorari denied, 434 U.S. 844; *United States ex rel. Cardaio* v. *Casscles*, 446 F. 2d 632, 637-638 (C.A. 2).

mainsprings of human conduct." *Commissioner* v. *Duberstein*, 363 U.S. 278, 289. See *United States* v. *Bradshaw*, 515 F. 2d 360, 364-365 (C.A. D.C.), reversed on other grounds *en banc sub nom. United States* v. *Robinson*, 533 F. 2d 578, certiorari denied, 424 U.S. 956; *United States* v. *Gargotto*, 510 F. 2d 409 (C.A. 6), certiorari denied, 421 U.S. 987. This Court and the lower courts therefore have repeatedly held that a trial judge's determination of matters such as these—even if they should not be accorded the same degree of deference as a credibility determination—should not be disturbed unless clearly erroneous. See, *e.g.*, *Campbell* v. *United States*, 373 U.S. 487, 493 (producibility of interview reports under the Jencks Act); *Davis* v. *United States*, 328 U.S. 582, 593 (voluntariness of a consent to search); *United States* v. *McCaleb*, 552 F. 2d 717, 720-721 (C.A. 6) (same); *United States* v. *Lemon*, 550 F. 2d 467, 472 (C.A. 9) (same); *United States* v. *Woodward*, 546 F. 2d 576 (C.A. 4) (search not the result of allegedly unlawful surveillance); *United States* v. *Jackson*, 544 F. 2d 407, 410 (C.A. 9) (abandonment of property); *United States* v. *Quinn*, 540 F. 2d 357, 361 (C.A. 8) (prejudice to the defendant from pre-indictment delay). See generally *United States* v. *Hart*, 546 F. 2d 798, 801-802 (C.A. 9), certiorari denied *sub nom. Robles* v. *United States*, 429 U.S. 1120; *United States* v. *Tallman*, 437 F. 2d 1103, 1104-1105 (C.A. 7); *Jackson* v. *United States*, 353 F. 2d 862, 864-865 (C.A. D.C.). After observing the witnesses and hearing the evidence at the suppression hearing, the district court was in by far the best position to judge whether the agents' swift action was reasonable in the circumstances of this case. Since the court of appeals found the issue to be a close one, it properly concluded not to disturb the lower court's determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

JEROME M. FEIT,
FRANK J. MARINE,
Attorneys.

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